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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 397.

BRADY TRANSFER AND STORAGE COMPANY, ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*.

BRIEF OF THE IRREGULAR ROUTE COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC. IN REPLY TO THE MOTION TO AFFIRM.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Foreword.

This brief in opposition to Appellees' motion to affirm the judgment and decree entered by the District Court of the United States for the Southern District of Iowa, Central Division, entered September 3, 1948, is presented on behalf of the Irregular Route Common Carrier Conference of the American Trucking Associations, Inc. The Conference was an intervening plaintiff in the proceeding before the District Court.

The Conference is a voluntary association composed of hundreds of common carriers of property by motor vehicle conducting operations over irregular routes by virtue of certificates issued them by the Interstate Commerce Commission. They have a vital interest in the principles of this case as the future growth and development of their businesses may be affected. The Conference members operate substantial transportation businesses and are vitally concerned with the question of whether the Interstate Commerce Commission has power to restrict the quantity and method of performing their transportation services.

Statement of the Case.

This proceeding results from the report and order of the Interstate Commerce Commission entered February 3, 1947, in Docket No. MC-C-246, entitled, *Transportation Activities of Brady Transfer and Storage Company.* Briefly, the proceeding before the Interstate Commerce Commission presented for determination the question whether Brady Transfer and Storage Company, holding authority to operate over irregular routes, had, by certain actions, converted that irregular route authority to regular route authority in violation of the terms of its certificate of public convenience and necessity.

Departing from the narrow issue presented by the original investigation, the Commission issued a report indicating tentative conclusions on the general question of what constitutes a regular route operation contrasted with an irregular route operation, or the line of demarcation between those two types of operations. This was done, as the Commission states in its report and order of February 3, 1947, "Because of the nationwide importance of this broader question . . .".

In this tentative report the Commission set forth and discussed eight practices thought to be indicative of regular route operations. These eight practices or criteria are re-

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peated and adopted in the February 3, 1947 report of the Commission. Briefly they are:

(1) Operation according to a predetermined plan or outline.

(2) The movement in significant amounts of particular types of traffic.

(3) The vigorous solicitation of this particular type of traffic and the holding out of particular types of service.

(4) The maintenance at significant points of terminals devoted to, and designed for, the expeditious handling of certain traffic and the conduct of certain types of operation.

(5) The habitual use of certain (fixed) routes.

(6) Operation between fixed termini.

(7) A marked or constant periodicity in the service given.

(8) The observance of definite or published schedules or their equivalent.

Argument.

The effect of the Commission's report is to hold that these eight criteria are peculiar only to carriers holding certificates authorizing operations over regular routes and, that carriers holding irregular route authority are precluded or forbidden to employ all or some undetermined combination of these eight criteria even though the transportation performed lies wholly within the territorial and commodity authorization.

The statute recognizes only two classes of carriers by motor vehicle—common carriers and contract carriers. The rights, duties, and obligations of common carriers operating over irregular routes are precisely identical with those of carriers operating over regular routes.

The report of the Interstate Commerce Commission would limit the right of carriers operating over irregular

routes to develop a large and substantial volume of business. Irregular route carriers have the right to develop their businesses and that right should not be defeated.

The theory that irregular route carriers were to be accorded treatment different than accorded regular route carriers was expressly negatived in *United States* v. *Carolina Freight Carriers Corp.* (1942), 315 U. S. 475.

The Conference takes the position that none of the eight criteria are peculiar only to regular route carriers because, under the statute there is but one class of common carriers. As between carriers operating over regular or irregular routes there is no difference as to their right to develop a large volume of business; they have exactly the same obligation to the shipping public.

The report of the Commission in this proceeding emphasizes that none of the criteria, with the exception of the observance of definite, published schedules, necessarily is conclusive of regular route operation and, that it is impossible to lay down a general rule for determination of the regular or irregular route character of a motor carrier operation.

The opinion of the District Court sheds no light on this particular feature nor does the report of the Commission. Otherwise stated, neither the opinion of the District Court nor the report of the Commission expressed with particularity the line of demarcation between what, in their opinion, constitutes regular route operations as contrasted with irregular route operations. Both the report and the opinion are vague and indefinite as to employment or use of the eight criteria by carriers holding irregular route authority. To emphasize, it is impossible from either the report or the opinion to determine which, and in what combination, carriers operating over irregular routes may use the eight criteria.

The effect is to leave all holders of certificates authorizing operations over irregular routes, uncertain and indefinite as to the future course of conduct of their trans-

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portation businesses. Because of this uncertainty the carriers operating over irregular routes will, in the future, be forced to conduct their operations at their peril. This is necessarily so because neither the report nor the opinion contain any guide post or standard by which these carriers may determine their future conduct.

It is for these reasons that the Court respectfully is urged to deny the motion to affirm and to permit the parties to be heard by brief and argument so that a clear-cut determination of the issues raised by the decision of the Interstate Commerce Commission may be had. Affirmation of the judgment and decree of the District Court will leave this large group of motor common carriers operating over irregular routes in confusion and uncertainty.

Appellants argue, and the opinion of the District Court states, that irregular route operators have been granted under the "grandfather clause", operating authority more extensive than their actual operations during the "grandfather period". In support of this conclusion the District Court cites the decision in *Alton Railroad Company* v. *United States,* 315 U. S. 15 (1942).

The majority of the outstanding certificates of public convenience and necessity authorizing irregular route operations, were issued by the Interstate Commerce Commission under the so-called "grandfather clause" of the Motor Carrier Act of 1935 (Sec. 206 (a), Part II of the Interstate Commerce Act as amended, title 49 USC Sec. 301-327). Those certificates were granted only after applicants had shown *substantial, continuous operations* and the certificates were delimited in accordance with the proof submitted. (*U. S.* v. *Carolina Freight Carriers Corp.,* 315 U. S. 475)

It is true that in the case of special commodity haulers, transporting a single commodity such as household goods, oil field supplies and equipment or automobiles, the Commission has granted territory over irregular routes broader than the scope of the actual service performed. The *Alton*

case is illustrative of the action of the Interstate Commerce Commission on applications of this type.

However, in the case of diversified or general commodities, the Interstate Commerce Commission followed no such practice or policy. *United States* v. *Carolina Freight Carriers Corp.* (1942), 315 U. S. 475, illustrates how the Commission cut down the territory of such a carrier to that within which *substantial and actual* service could be proved. This situation is even better illustrated in *Howard Hall Co.* v. *United States* (1942), 315 U. S. 495, in which the applicant sought authority to serve a territory within a 100-mile radius of Birmingham, Ala., and the Commission cut the territory down to that within a 10-mile radius. In that case, the Court said:

> "The precise geographical pattern for future operations in the product of an expert judgment based on the substantiality of the evidence as to prior operations, the characteristics of the particular type of carrier, the capacity or ability of the applicant to render the service."

Conclusion.

Sec. 208 of the Interstate Commerce Act, Part II in part provides, "That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require."

Relying on this provision and the fact that the certificates issued by the Interstate Commerce Commission contain no service limitation, Conference members have invested hundreds of millions of dollars in their transportation businesses. Additionally, until the report in the *Brady* case was issued by the Interstate Commerce Commission holders of certificates authorizing operations over irregular routes had no intimation that they could not employ any

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or all of the eight criteria or that these eight criteria were considered by any one to be attributes only of regular route operations.

The substantial questions of statutory construction raised by the action of the Commission never have been judicially determined.

Because of the importance to the Conference of obtaining a clear-cut determination, it is submitted that the motion to affirm should not be granted.

Respectfully submitted,

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Certificate of Service.

I hereby certify that copy of this brief has been served upon each party indicated below by mailing a copy thereof, postage prepaid, to each.

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